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No. 09-1238

IN THE
Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION FOR KRISTIN M. PERRY ET AL.

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QUESTION PRESENTED

Whether this Court should vacate a two-sentence, unpublished, nonprecedential lower-court order that denies a request for mandamus that petitioners concede is now moot.

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BRIEF IN OPPOSITION FOR KRISTIN M. PERRY ET AL.

Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo ("plaintiffs"), and the City and County of San Francisco, respectfully submit this brief in opposition to the petition for a writ of certiorari filed by Dennis Hollingsworth et al.

OPINIONS BELOW

The order of the court of appeals denying the petition for a writ of mandamus is neither published nor electronically reported. Pet. App. 1. The order of the district court is also unpublished and unreported. *Id.* at 2.

JURISDICTION

The court of appeals entered its order denying the petition for a writ of mandamus on January 8, 2010. This Court lacks jurisdiction over the merits of petitioners' mandamus request because petitioners concede that their request is moot. Pet. 11.

STATEMENT

Petitioners ask this Court to vacate a two-sentence, unpublished, nonprecedential lower-court order that denies a request for mandamus that petitioners concede is moot. Petitioners seek that unprecedented relief without making any effort to demonstrate that the "extraordinary" equitable remedy of vacatur is appropriate in this case. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). Granting petitioners the relief they request would vastly expand the circumstances under which vacatur is appropriate, needlessly undermine the fi-

nality of lower-court decisionmaking, and inevitably generate an avalanche of similarly insubstantial vacatur requests in this Court. The petition for a writ of certiorari should be denied.

1. Plaintiffs are gay and lesbian Californians who filed suit in the United States District Court for the Northern District of California challenging Proposition 8 ("Prop. 8")—the California constitutional amendment that extinguished their right to marry—under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Petitioners are the official proponents of Prop. 8 who orchestrated the campaign to place Prop. 8 on the November 2008 election ballot and to secure its passage. Petitioners intervened in this case to defend the constitutionality of Prop. 8. The district court scheduled a trial to begin on January 11, 2010.

2. On January 7, 2010, the district court formally requested that the Chief Judge of the Ninth Circuit include this case "in the Ninth Circuit pilot project on audio-video recording and transmission," and permit the trial proceedings to be recorded, transmitted to designated federal courthouses outside the Northern District of California, and posted on the district court's website. Pet. App. 3. On January 8, 2010, Chief Judge Kozinski approved that request, "limited to real-time live streaming to federal courthouses." *Id.* at 4.

Also on January 8, petitioners filed a petition for a writ of mandamus in the Ninth Circuit seeking to overturn the district court's decision to record and transmit the trial proceedings for public distribution. The Ninth Circuit denied the petition the same day in an unpublished, nonprecedential order that stated, in its entirety:

> Petitioners have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. United States Dist. Court*, 557 F.2d 650 (9th Cir. 1977).
>
> Accordingly, the petition is denied.

Pet. App. 1.

3. On January 9, 2010, petitioners filed an application with Justice Kennedy seeking a stay of the district court's order regarding the recording and distribution of the trial proceedings pending the filing of a petition for a writ of certiorari. On January 11, 2010, the first day of the trial, this Court issued a temporary stay of the district court's order, except as it permitted distribution of the trial proceedings "to other rooms within the confines of the courthouse in which trial is to be held." *Hollingsworth v. Perry*, 130 S. Ct. 1132, 1132 (2010). On January 13, 2010, this Court issued a per curiam opinion that extended the stay pending the filing of a petition for certiorari. *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010).

In accordance with the stay, the district court limited transmission of the trial court proceedings to an overflow courtroom "within the confines of the courthouse in which trial [was] held." *See* Pet. App. 35. The district court also requested that the case be removed from the Ninth Circuit's pilot program on audio-video recording. *Id.* at 5. Chief Judge Kozinski granted that request. *Id.*

Witness testimony ended on January 27, 2010, and the district court heard closing arguments on June 16, 2010. No part of the trial was publicly transmitted outside the courthouse in which the trial was held.

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied because petitioners have not identified any basis—let alone the requisite "extraordinary" justification—for vacating the Ninth Circuit's two-sentence, unpublished, nonprecedential order.

Petitioners concede that their mandamus petition seeking to overturn the district court's decision to record and publicly distribute the trial proceedings is "moot." Pet. 11. Indeed, petitioners could hardly have contended otherwise: The district court's decision was stayed by this Court before the trial began, the case was removed from the Ninth Circuit's pilot program on audio-video recording in response to this Court's stay, and the trial has now been completed without any of the proceedings having been transmitted outside the confines of the courthouse in which they took place. Petitioners acknowledge that, "[a]s a result of these post-stay actions by the district court, Petitioners have, in effect, obtained the relief they sought through their mandamus petition." *Id.* at 12. The dispute that was the subject of the petition for mandamus is therefore over, and the mandamus request no longer presents a live case or controversy. *See Lane v. Williams*, 455 U.S. 624, 633 (1982) (where plaintiffs "have obtained all the relief that they sought" when filing suit, "no live controversy remains"); *cf. Lopez v. Gonzales*, 549 U.S. 47, 52 n.2 (2006).

Where an issue on which review is being requested is acknowledged to be moot at the time the Court considers a petition for certiorari—or where the Court identifies mootness later in the proceedings—the appropriate course is to deny or dismiss the petition. *See, e.g., Williams v. Allen*, 552 U.S.

803 (2007); *Aguilar v. Quarterman*, 547 U.S. 1204 (2006); *Jordan v. Ohio*, 543 U.S. 952 (2004); *see also City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 286 (2001).

Despite the undisputed absence of a live controversy between the parties on the issue under review, petitioners contend that the Court should grant certiorari and vacate the Ninth Circuit's summary order denying their mandamus petition. That unorthodox request finds no support in this Court's precedent, in the principles of equity that govern the availability of vacatur, or in standards of sound judicial administration.

Petitioners premise their vacatur request almost exclusively on this Court's decision in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). In so doing, they entirely overlook this Court's subsequent decision in *Bonner Mall*, which makes clear that vacatur is an "extraordinary remedy" and that "[i]t is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate . . . equitable entitlement" to that remedy. 513 U.S. at 26. Granting vacatur in the absence of extraordinary circumstances, the Court emphasized, would undermine the "public interest" and "disturb the orderly operation of the federal judicial system." *Id.* at 26, 27; *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997) (holding that "'exceptional circumstances'" were present to justify a mootness-based vacatur because the plaintiff's actions had denied defendant an opportunity to obtain appellate review of an adverse decision).

Petitioners do not even attempt to argue that this case presents the type of "exceptional" circumstances that are alone sufficient to warrant the equi-

table remedy of vacatur. And with good reason. Leaving the Ninth Circuit's unpublished and nonprecedential order undisturbed would have absolutely no consequences for the parties themselves—or for the public at large. That two-sentence order has no continuing relevance to the parties' underlying dispute regarding the constitutionality of Prop. 8 and will have no precedential effect in future litigation between other parties.

In contrast, there would be profound consequences—for the judicial system, in general, and for this Court, in particular—if parties were entitled to the extraordinary remedy of a mootness-based vacatur on the wholly un-extraordinary grounds offered by petitioners. A decision in petitioners' favor could generate an exponential increase in the number of requests for mootness-based vacaturs in this Court and the courts of appeals—diverting scarce judicial resources from more important tasks, undermining parties' settled expectations about the finality of judicial decisions, and eviscerating lower-court precedent "valuable to the legal community as a whole." *Bonner Mall*, 513 U.S. at 26. "Respect for lower courts, the public interest in finality of judgments, and concern about [this Court's] own expanding certiorari docket all counsel against [such] undisciplined GVR'ing." *Lawrence v. Chater*, 516 U.S. 163, 174 (1996) (per curiam).

The serious repercussions of issuing unnecessary mootness-based vacaturs underscore the truly exceptional nature of this equitable remedy. As the Court has done until now, it should reserve that powerful—and potentially disruptive—remedy for cases where the party seeking vacatur has demonstrated a compelling justification for relief from the lower-court

judgment. Petitioners have not come close to meeting that substantial burden in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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